No. 09-182

IN THE

Supreme Court of the United States

DON EUGENE SIEGELMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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Petitioner, Governor Don Siegelman, respectfully submits as follows.

1. The first question concerns the meaning of the "explicit *quid pro quo*" standard of *McCormick v. United States*, 500 U.S. 257 (1991), as the dividing line between crime and politics in situations where it is suspected that an official's actions were influenced by campaign contributions. *See id.* at 271 & n.9 (repeatedly referring to the issue in terms of "explicit *quid pro quo*"). This Court adopted that line for the avowed purpose of bringing clarity to the law. *Id.* at 272-73. This Court recognized that a standard allowing prosecution on lesser proof would put politicians and donors in jeopardy of criminal conviction

for doing things that are unavoidable in our electoral and campaign-finance system. *Id.*

The clarity that this Court sought to create in *McCormick* has broken down. The situation has become even more dire since we filed our Petition. The Ninth Circuit's new decision in *United States v. Inzunza*, 580 F.3d 894 (9th Cir. 2009) shatters the already-broken understanding of the law into even smaller shards.

Inzunza is good in one respect: it holds that the *McCormick* "explicit *quid pro quo*" standard applies to honest services cases, just as it does under the Hobbs Act. This holding is demonstrated by the fact that, using that standard as the court had described it previously in its opinion, the court upheld a judgment of acquittal for one of the defendants on the honest services as well as the Hobbs Act charges. 580 F.3d at 911-912. Therefore, the Government is wrong in claiming (BIO p. 24) that no court has yet definitively applied the *McCormick* standard to a campaign contribution case brought under the honest services law.

But what is the *McCormick* standard? That's the problem, and *Inzunza* makes it worse.

At the time of the Petition, as we showed, the disagreement was basically a two-sided debate. The two sides disagreed on whether an "explicit *quid pro quo*" agreement, promise or undertaking really has to be "explicit" in the sense of "express." And, as we showed, this disagreement is doctrinally based in a disagreement as to whether *Evans v. United States*, 504 U.S. 255 (1992), diluted the *McCormick* standard for campaign-contributions cases, or whether instead

Evans diluted the *quid pro quo* standard only for cases not based on campaign contributions.

On one side of that divide was the Eleventh Circuit, declaring here that *Evans* diluted the *McCormick* standard in campaign contribution cases, and that "explicit" does not have its normal meaning of "express" after *Evans*. On the other side were cases including *United States v. Ganim*, 510 F.3d 134 (2d Cir. 2007) (Sotomayor, J.) equating "explicit" with "express," and treating Evans as having modified the *McCormick* standard for those cases that do not involve campaign contributions. (We quoted some striking parts of *Ganim* in our Petition, p. 15. The Government tries to minimize *Ganim* as being just dicta and mostly about other things, but the parts we quoted are clear and decisive.)

But now comes *Inzunza*, in which the Ninth Circuit shatters the understanding further. The Ninth Circuit declares that *McCormick*'s "requirement of explicitness refers to the promise of official action, not the connection between the contribution and the promise." *Inzunza*, 580 F.3d at 900. Indeed, the Ninth Circuit goes so far as to intimate that the connection between contribution and official action doesn't necessarily have to be an agreement or understanding between the official and the contributor at all, not even an implicit one; rather, at one point the Ninth Circuit describes the necessary connection only as a "causal[]" one. *Id.*

This Ninth Circuit view—that only the official's statement as to what action he will take must be explicit, but that the connection between that action and the campaign contribution does not have to be explicit in any sense at all—is dramatically different from the Eleventh Circuit's. On the Eleventh Circuit's

repeatedly-stated, firm and indeed correct understanding, the "agreement" linking the action and the contribution is what must be "explicit." [Pet App. 16a, 17a, 18a, 19a, 561 F.3d at 1226, 1227]. (The Eleventh Circuit went wrong, though, in concluding that "explicit" means something like "about a specific official action, even if only implicit," rather than meaning "express.") Other courts agree that it is the agreement, the connection between contribution and action, that must be "explicit." *See, e.g., United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993) ("[T]he Supreme Court in *McCormick* added . . . the requirement that the connection between the payment and the exercise of office—the quid pro quo—be explicit.")

So the situation is at least a three-way debate now. The Ninth Circuit demands an "explicit *quid*"—an explicit promise as to what action the official will take[1]—but only an implicit "*pro quo*." The Eleventh Circuit accepts even an "implicit *quid*"—since it does not even require that the promise of official action be explicit in the ordinary sense of that word—and an "implicit *pro quo*." The Second and Sixth Circuits, at least, appear by their opinions to believe in a truly "explicit *quid pro quo*" standard for campaign contribution cases, as shown in the Petition. The law is a mess.

Governor Siegelman would prevail under any of the various standards that have been adopted outside the Eleventh Circuit. He would prevail even under the Ninth Circuit's *Inzunza* pronouncement that only the promise of official action, not the connection to

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[1] As shown in the Petition (p. 15), "explicit" means "express" in the Ninth Circuit.

the contribution as *quid pro quo*, needs be "explicit." He would prevail under that standard because there is literally no evidence that he promised Scrushy, or anyone else, that he would appoint Scrushy to the C.O.N. Board. Recall even the words of Government star witness Bailey [Pet. App. 7a], purporting to recount a conversation that occurred after Siegelman had met with Scrushy and received a contribution. It was, in Bailey's telling, future tense and even subjunctive: what is Scrushy "going to want," "I wouldn't think that would be a problem, would it?" and the Governor replying, "I wouldn't think so." Not "I told him it was no problem," and not even, for that matter, "No, it's not a problem." There is no hint that the Governor had promised the appointment, and this evidence—which is the closest the Government came—shows an expectation rather than a promise at best.

In sum, there is stark confusion in the lower courts, about what it takes to turn campaign fundraising, along with political action that benefits some donor, into a crime. The Government wants this Court to hold out on granting certiorari in any such case until there is a Circuit split of perfect crispness, with nothing that can be portrayed as having been dicta, no anterior questions that must be addressed even if they are easy ones, nothing to detract from pure simplicity. To the Government, this is a set of questions that can wait and wait until someday, if ever, when the absolutely perfect vehicle carrying a lovely Circuit split arises.

As explained in the *amicus* briefs of a bipartisan group of former State Attorneys General, and of a group of law professor scholars, the present confusion must not be allowed to last. This is no ivory-tower

exercise. It presents the real risk that federal prosecutors will follow different understandings of the law, in determining which cases to pursue, depending on where they live. Nor is this one of those arcane questions, interesting mostly to lawyers, where regional disagreement can be allowed to linger for years without serious adverse consequences to any real-world interests. This mess presents serious dangers for all elected officials in the nation. It presents serious dangers for private citizens, too. Consider a prominent person in any State who would like to be appointed to the Board of his *alma mater* public university—an extremely common desire for politically savvy people to harbor. That person now cannot know whether hosting a fundraiser for the Governor would be a great idea, or a ticket to jail at the hands of a headlines-seeking prosecutor. Consider a banking industry lobbyist who has always contributed heavily to Senate Banking Committee members, and lobbied them for official actions. Now she has to fear that if a Senator promises to take one of those requested actions, she could be indicted if some particularly suspicious-minded prosecutor believes in retrospect that there was an implicit causal connection with all those contributions. This is a mess, which this Court can and should resolve in this case.[2]

2. The second issue pertains to 18 U.S.C. § 1512(b)(3), and the required element of proof of "intent to . . . hinder, delay, or prevent" communication to law enforcement.

The Government does *not* argue that this issue was unpreserved, either in the District Court or on

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[2] This Court should, at least, hold this Petition pending resolution of the various already-granted cases that involve "honest services."

appeal. Stopping far short of any such contention, the Government only muses about *how* Governor Siegelman preserved it. This is no basis for denying review. Governor Siegelman expressly presented to the Court of Appeals the very argument that is the basis for this issue, including a lengthy discussion in his reply brief. The Government admits as much. (BIO pp. 27-28).[3] Governor Siegelman also made the point directly again at oral argument. The Court of Appeals had the square chance to rule on this issue. The Court of Appeals did not suggest that any part of Governor Siegelman's argument was unpreserved. And this Court's jurisdiction is unquestioned.

The Government also suggests (BIO pp. 26-27) that this issue arises in an "interlocutory" posture because Governor Siegelman faces resentencing, and because he has a new-trial motion pending. The pendency of the new-trial motion is a throwaway argument. This is shown by the fact that Scrushy has the same motion pending, yet the Government does not contend that his petition is interlocutory in any sense. And the other pending matter—resentencing, after reversal of two counts of conviction—is no reason to deny review. The Court of Appeals has given its final word on the validity of this count of conviction, and the issue is now squarely presented to this Court. Again this Court's jurisdiction is unquestioned. And the Government offers no reason to believe that review would be more efficient if it was postponed

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[3] Governor Siegelman noted the absence of proof of the relevant intent, both as to the alleged misleading of Bailey's lawyer and as to the alleged persuasion of Bailey. As to the latter, *see* Siegelman Reply Brief in CA11, pp. 28, 35 n.8. Siegelman also showed that there was no evidence that he even persuaded Bailey; as noted in the Petition (p. 24), on merits review this Court should agree on that point as well.

until after a sentencing proceeding that will neither change this issue nor make it moot. The Government is merely placing hurdles for the sake of placing hurdles.

Turning to the merits, the Government contends that it did prove the requisite intent to "hinder, delay or prevent" communication to law enforcement, either by Bailey's lawyer or by Bailey and Young.

As to Governor Siegelman's supposed intent vis-à-vis Bailey's lawyer, the Government's current position (BIO p. 31) seems to be that the intent was to get the lawyer to tell law enforcement that the motorcycle sale transaction was legitimate. Trying to bring this within § 1512(b)(3), the Government is forced to argue that the statute covers giving incorrect information to a person with the intent that the person will then pass it along to law enforcement, regardless of whether the person would have otherwise communicated anything to law enforcement at all.

In this, the Government is fighting against the plain language of the statute. Congress could write an obstruction statute that covered intentionally promoting the communication to law enforcement of information that the Government claims to have been false. But § 1512(b)(3), by its plain terms, is not such a statute. It covers only efforts to "hinder, delay or prevent" communications to law enforcement. An intent to make a person into a favorable witness, where absent such efforts the person would not have had anything either good or bad to tell law enforcement, does not come within this scope; it doesn't constitute the intent to hinder, to delay, or to prevent communications under any normal interpretation of those words. (The Government hints (BIO p. 30) that it believes that "hinder" has some meaning that is

markedly different from "delay" and "prevent," giving this statute a broad scope. If that is the Government's position, it is contrary to normal English usage.)[4]

As to Governor Siegelman's supposed intent vis-à-vis Bailey and Young, the Government contends that Governor Siegelman's intent, when getting this final check from Bailey for the remaining purchase price of the motorcycle, was to get Bailey and Young "locked in" to the story that Bailey had bought a motorcycle from Governor Siegelman with a loan from Young. (BIO p. 30). And he wanted to get them "locked in," the Government's story goes, because he was thinking something like "That will make it harder for them to tell the federal investigators incriminating things about all of us."

This an absurd fantasy with no basis whatsoever in the evidence. Among other things, this story is utterly destroyed by the undisputed fact—from testimony of Government star witness Bailey himself—that it was *his* idea to portray himself as having received a loan from Young so that he could purchase the motorcycle from Governor Siegelman, and then it was *his* idea to pay Young back once he found that an investigation was ongoing. It had been Bailey who

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[4] The Government cites *United States v. Applewhaite*, 195 F.3d 679 (3d Cir. 1999), as a § 1512(b)(3) case that involved feeding false information to someone with the intent that he pass it on to law enforcement. But that decision did not discuss the issue that we are presenting here; there is no indication that any party argued that there is a distinction between creating false information on the one hand, and hindering, delaying or preventing the communication of information on the other hand. The Government also cites *United States v. Veal*, 153 F.3d 1233 (11th Cir. 2009); but that is one of the idiosyncratic cases that we distinguished in the Petition at 27, n.9.

had, at the outset, suggested that Young give money to him, not to Governor Siegelman, so that he could purchase the motorcycle. [Trial Transcript p. 459 ("I made the suggestion that Lanny [Young] give me the money and let me give it to the Governor rather than Lanny giving the money directly to the Governor. . . . I didn't think it was appropriate for Lanny to be in partnership with the Governor on a motorcycle . . .")]. And later, as Bailey further said, "I found out about the investigation that was going on with Lanny. . . . I wanted to repay Lanny's $9200. I did it in the form of a check." [Trial Transcript p. 475].

So Bailey and Young were, undisputedly, fully locked in to that version of events, by their own doing, well before the events took place that are the basis of this count of conviction. The one and only thing for which Governor Siegelman was convicted under § 1512(b)(3), was the last check that came at the tail end of this sequence; it was Bailey's payment of the final bit of the motorcycle's purchase price to Governor Siegelman. There is no reason to believe that Governor Siegelman had any thought, at that moment, that he needed to "lock in" Bailey and Young to anything; they had locked themselves as tightly as they could already. They were already fully committed to the principle that this had been a purchase of a motorcycle by Bailey with a loan from Young. In suggesting that Governor Siegelman harbored the specific intent that he needed to lock them into that supposedly false account at the very end of the whole chain of events, the Government is making up a story with no basis in reality.

By this point, the Court may be thinking that the Government has made this a fact-bound issue. Still, however, there is a live legal issue about the meaning

of the statute's words, as well as about whether this conviction was warranted under the law. And, we submit, the Government's obfuscatory tactics in opposing certiorari on this issue—throwing up frivolous procedural hurdles, twisting the statute's language, and running roughshod over the facts—show that this count of conviction deserves serious attention from the Court, to ensure that justice is done.

CONCLUSION

A common thread linking the two issues here is that there are prosecutors who, even if only rarely, sometimes ask the federal criminal code to conform itself to their intuitions. A case can start with prosecutorial disapproval of a person or situation, and the laws are then treated as a malleable set of words that can be pressed as necessary to match the intuition and to permit a conviction. Whether it takes the form of expanding discretion under ambiguous statutory language as in the first question, or ignoring the boundaries set by clear statutory language as in the second, such an approach to the law is dangerous to liberty whenever it appears. In prosecutions of elected officials and cases implicating First Amendment interests, like this one, it is also dangerous to our system of democracy. This Court should grant review on both questions.

Respectfully submitted,

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